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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 113–128) is reported at 358 F. 2d 154. The district court opinion on the motion to dismiss the indictment (R. 26–28) is reported at 225 F. Supp. 161, 174–175.

JURISDICTION

The judgment of the court of appeals (R. 129) was entered on March 25, 1966. A petition for rehearing (R. 130) was denied on May 3, 1966. The petition for a writ of certiorari was filed on May 28, 1966, and was granted on October 10, 1966 (R. 131). The jurisdiction of the Court rests on 28 U.S. 1254 (1).

QUESTIONS PRESENTED

1. Whether payment of the ten percent federal excise tax on wagers may be avoided on the ground that payment would violate the privilege against self-incrimination.

2. Whether the trial judge erred in his treatment of a note from the jury.

STATUTES INVOLVED

The pertinent provisions of the wagering tax laws and Treasury regulations are printed in Appendix A, *infra*, pp. 37–40.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Pennsylvania on fifteen counts charging the wilful failure to pay the excise tax on wagers imposed by 26 U.S.C. 4401; on four counts charging the wilful failure to pay the special occupational tax, as required by 26 U.S.C. 4411, prior to engaging in the business of accepting wagers; and on one count charging a conspiracy, in relation to the excise tax, to defraud the United States in violation of 18 U.S.C. 371. On March 10, 1963, he was sentenced to imprisonment for a total of nine years and was fined $191,000 (R. 8–10). The court of appeals affirmed (R. 129).

Prior to trial, petitioner unsuccessfully moved to dismiss those counts (counts 1 through 19) which charged failure to pay the ten percent excise tax on wagers on the ground that payment would violate his privilege against self-incrimination (R. 26–28; 225 F. Supp. at 175). A similar objection was made and

rejected during trial (R. 35), as part of a motion for a judgment of acquittal at the close of the government's case (R. 36–37), in a motion for judgment after verdict, and in a motion for a new trial (R. 75–77; 78–84).

The evidence in this lengthy case, the sufficiency of which is not here in issue, showed that petitioner conducted with others a large-scale gambling operation. Petitioner, however, testified that he had gone out of the "numbers business" in 1950 when the gambling stamps "came into play" and had turned over the business to his brother, co-defendant Samuel Grosso (R. 104–105). He said he reported for income tax purposes "around $50,000 a year" derived largely from personal gambling in Florida and elsewhere (R. 108–113).[1]

SUMMARY OF ARGUMENT

I

Payment of the ten percent excise tax on wagers does not violate the privilege against self-incrimination. As has been repeatedly held, the federal government may tax activity which either it or a State may make unlawful. The information revealed in effecting payment of the excise tax and filing the related return is minimal—identification of the taxpayer and the tax computation. Payment is, obviously, a

[1] Since the facts relating to the second issue raised by petitioner—that of an improper communication to the jury—are wholly distinct from those underlying his wagering tax contentions, they are set forth, together with our argument on that issue, in Point III, *infra*, pp. 30–32.

necessary component of a tax; if Congress cannot compel payment and punish non-payment, it can hardly be said to have the power to levy the tax. Hence, in our view, the limited nature of the inquiry and the governmental interest in tax collection dictate the conclusion that payment of a valid tax may be required without running afoul of the privilege. Moreover, the statute plainly provided notice to petitioner of the tax consequences attached to entering and engaging in the business of accepting wagers. Having voluntarily chosen to enter that business, he must respect the tax conditions previously attached to it; thus, no prohibited compulsion inheres in payment of the tax.

II

Should the Court nonetheless conclude that payment of the excise tax on wagers involves substantial danger of incrimination, the Fifth Amendment rights asserted can be fully protected by adoption of a rule restricting the use of the information disclosed. Such a rule is particularly appropriate where the privilege is invoked to excuse not merely non-registration but a failure to pay the excise tax at all. A use-restriction rule would be a viable accommodation between the individual's right not to incriminate himself and the governmental interest in collecting taxes. A similar resolution of a conflict between Fifth Amendment rights and governmental interests was effected by this Court in *Murphy* v. *Waterfront Commission*, 378 U.S. 52. There would be nothing unique or unusual about the adoption of such an exclusionary rule;

rather, it would be a step which this Court has repeatedly taken in appropriate circumstances, such as in *Murphy*.

Whether to grant complete immunity from prosecution incident to obtaining certain information is a matter traditionally committed to legislative judgment. What is suggested here is not a rule of immunity, but an exclusionary rule—one which would proscribe the use, directly or indirectly, of information disclosed incident to registration and payment under the wagering tax laws, in any subsequent federal or State prosecution. In situations where Congress has not acted, it is within this Court's power to fashion such a rule; to do so here would in no way conflict with the congressional design in enacting the wagering tax laws.

III

During their deliberations, the jury sent the trial judge a note in which they indicated they could not agree. The judge informally responded through the bailiff that the jury should keep on working. Although notified of the incident within forty-five minutes of its occurrence, petitioner waited until after the verdict was reached, notwithstanding a second similar note and like response, to raise the issue of an improper communication to the jury in his absence. Had the issue been seasonably raised, any speculation as to possible prejudice could have been investigated and resolved in the trial court. Since petitioner did not pursue this course, reversal in the circumstances is unwarranted.

ARGUMENT

INTRODUCTION

In the goverment's brief in *Costello* v. *United States,* No. 41, this Term, pp. 9–11, we have set forth a summary and history of the wagering tax laws. We do not repeat that summary and history here. We note, however, that there are a number of other federal excise taxes and that these taxes relate to such disparate products, goods, or activities, as, *e.g.,* petroleum products (26 U.S.C. §§ 4041, 4081, 4091), motor vehicles, parts, and accessories (§ 4061), stills and condensers (§ 5101), coin-operated gaming devices (§ 4461), liquor, wine and beer (*e.g.,* §§ 5001, 5021, 5091, 5111, 5121), filled cheese (§ 4841), adulterated butter (§§ 4811, 4821), narcotic drugs and marihuana (§§ 4701, 4711, 4721, 4741, 4751), tobacco (§ 5701), and certain firearms (§§ 5801, 5811, 5821).[2] This list is far from exhaustive of the subjects of present excise taxes; nor would a complete list be exhaustive of the congressional power "to lay and

[2] The incidences of the taxes differ. Some of the taxes are imposed on the manufacturer, wholesaler, or retailer, or a combination thereof; those taxes may be of the occupational variety, requiring the payment of a fixed sum per year and evidenced by a stamp, or they may be levied as a percentage of the value of the product made or sold, or both. Some are imposed on the product itself, and others are imposed upon a transaction, such as the transfer or importation of particular products or goods. For a complete listing of the subjects of the excise taxes in force during 1965 and the revenue (over 14.5 billion dollars) derived from these taxes, see Commissioner of Int. Rev. Ann. Rep., Table 3, pp. 114–115 (1965); *id.*, Table 1, p. 106.

collect * * * excises * * * uniform throughout the United States." Constition, Art. I, Sec. 8. As is evident, the excise taxes listed above involve or relate both to lawful activity and to activity, products, or goods which are illegal under various federal, State and municipal laws.

I. THE MINIMAL DISCLOSURE INCIDENT TO PAYMENT OF THE EXCISE TAX ON WAGERS DOES NOT INFRINGE UPON THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. CONGRESS MAY TAX WHAT IT OR A STATE MAKES UNLAWFUL; THAT POWER NECESSARILY INCLUDES THE POWER TO REQUIRE PAYMENT

We emphasize at the outset the reach of petitioner's constitutional contention—that the *payment* of the ten percent excise tax on wagers would infringe upon his privilege against self-incrimination, and that his admitted failure to pay the tax is therefore excused by the Fifth Amendment.[3] The Constitution, we submit, provides no such easy escape from the duty to pay a tax. Petitioner's contention is not limited to objections to the excise tax return and to the information sought thereon;[4] payment alone, he urges, would vio-

[3] In the companion *Costello* case, it should be noted, the validity of the special occupational tax and its related registration provision are at issue. Although petitioner here was convicted on four counts for non-payment of the occupational tax, he has consistently restricted his constitutional contention to those counts involving the excise tax (Pet. Br. 3, 39).

[4] The return (Form 730) is attached as Appendix B, *infra*, p. 41. By regulation (Treas. Reg. § 44.6011(a)–1(a), App. A. *infra*, p. 40), the return is to be filed monthly. It includes spaces for the listing of the gross amount of wagers accepted during the month, the amount of "lay-off" wagers accepted (*i.e.*, a

late the privilege so long as it is necessary that the taxpayer identify himself (Pet. Br. 17). In short, petitioner contends that Congress must provide total immunity from any possible prosecution when it levies an excise tax if the activity taxed might be unlawful (Pet. Br. 24).

If Congress has the power to tax, the taxpayer must necessarily have the correlative duty to pay the tax. That power does not exist in the abstract; a tax obviously has reference to taxpayers—those subject to and required to pay the tax. Thus, unless Congress can compel payment and impose sanctions upon non-payment of a particular tax, it can hardly be said that Congress has the power to levy that tax. Necessarily encompassed by the power to tax is the right to obtain information essential to collection of the particular tax.[5] Certainly, a tax scheme could not be administered without the government's obtaining the name and address of those paying the tax. Little else is required by Form 730 beyond that identifying information and a computation of the tax due.

This Court has consistently sustained the legal obligation to pay taxes on activity which a State (or

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wager from another person in the business of accepting wagers, placed to spread the risk of winning bets), and the amount of the tax due (ten percent of the total of the preceding amounts, less the amount of credits).

[5] In the companion *Costello* case, we contend that the registration and disclosure provisions of the wagering tax laws, relating to the occupational tax, are reasonable incidents to the tax measure since necessary for enforcement and collection. Petitioner here, however, challenges the authority of the government to obtain not only the minimal information essential to tax administration, but payment itself.

the United States) makes unlawful. *License Tax Cases*, 5 Wall. 462 (lotteries); *United States* v. *Doremus*, 249 U.S. 86 (narcotic drugs); *Nigro* v. *United States*, 276 U.S. 332 (same); *Sonzinsky* v. *United States*, 300 U.S. 506 (firearms); *United States* v. *Sanchez*, 340 U.S. 42 (marihuana). See also *United States* v. *One Ford Coupe*, 272 U.S. 321; *United States* v. *Stafoff*, 260 U.S. 477, 480. Implicit in these decisions over the last century is a flat rejection of petitioner's contention, for the power of Congress to levy and collect an excise tax on various activities, without regard to their legality or illegality, has repeatedly been upheld. That is not to say that a valid tax may be administered free of all constitutional restrictions. But we urge that payment of the ten percent excise tax and the related filing of Form 730 should not be regarded as having any constitutional infirmities.

The excise tax on wagers is imposed uniformly, and does not depend on whether the underlying activity taxed is lawful or not under State or local law—just as the excise tax on retail dealers in liquor does not depend on whether or not a State has adopted prohibition laws. In the *License Tax Cases*, 5 Wall 462, 473, the Court stated:

> It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

Petitioner's contention presents just such an anomaly, for he urges that he is privileged not to pay this tax, primarily because his State prohibits gambling.

But, as this Court said with regard to the excise tax on retail liquor dealers (*United States* v. *Constantine*, 296 U.S. 287, 293):

> It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise.[6]

Yet, if petitioner were correct, in practical effect exemption from an otherwise valid tax results because a State has chosen to make unlawful a particular activity which Congress seeks to tax. However, as this Court said in another tax context (*Billings* v. *United States*, 232 U.S. 261, 282):

> It is * * * settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution * * *.

See also *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1; *McCray* v. *United States*, 195 U.S. 27, 61.[7]

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[6] In *Constantine*, the Court stuck down an additional $1,000 tax imposed only on those retail dealers who operated in a locality where the sale of liquor was prohibited. The Court expressed no doubt as to the validity of the $25 tax uniformly applicable, regardless of whether local law proscribed retail liquor sales. See our brief in *Costello*, p. 12, n. 10.

[7] Petitioner also urges that he is privileged not to pay the ten percent excise tax because that might reveal his failure to

The "conjurer's circle" that petitioner attempts to draw around himself and his activities would be as destructive of the proper enforcement of the excise tax laws as the attempt made by the taxpayer in *United States* v. *Sullivan*, 274 U.S. 259, 264. There, the taxpayer unsuccessfully urged that he was privileged not to file an income tax return because his income was principally derived from illicit traffic in liquor.[8]

Petitioner suggests that Congress must immunize from prosecution those whose activity it taxes (Pet. Br. 24). But obviously a State is free to prohibit, restrict, or condition conduct such as gambling. Congress, we submit, was equally free to make the realistic assessment which underlies the wagering tax laws:

> Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Fed-

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register as one in the business of accepting wagers and his failure to pay the occupational tax. But it has never been the law that one is excused from complying with a legal obligation because compliance might disclose some earlier delict. On petitioner's theory, a taxpayer who failed to file a tax return in one year might claim a privilege against filing a return in following years on the ground that the filing in a subsequent year might reveal to the Internal Revenue Service the previous failure to file. See also our brief in *Costello*, p. 19, n. 19.

[8] We concede (see our brief in *Costello*, p. 22, n. 21) that *Sullivan* is distinguishable and does not govern here. The income tax is directed at the broadest class possible and the form used is neutral on its face. By definition, an excise tax is directed at more limited classes of persons, products or goods, and Form 730 is for use only in making a wagering tax return.

> eral Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation.

H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 (1951); S. Rep. No. 781, 82d Cong., 1st Sess. 113 (1951). Indeed, in proposing the wagering tax, the committees noted (*ibid.*):

> Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities. Moreover, in the field of excise taxes the tax on coin-operated gambling devices has been applied without regard to whether or not the operation of a particular machine is in violation of State or local law. The present bill conforms to this pattern and imposes tax without regard to the legality or illegality of the particular wager.

If by asserting that immunity is a necessary requisite, petitioner means that Congress would have to declare the acceptance of wagers legal in order to tax one engaged in that business, then petitioner's argument falls by its own weight and by the judgment of history. See *License-Tax Cases,* and the other cases cited *supra,* p. 9. See also *James* v. *United States,* 366 U.S. 213; *Rutkin* v. *United States,* 343 U.S. 130.

A basic premise of petitioner's argument is that there is no difference between the government's seeking of information essential for the collection of a tax

and its direct inquiry of individuals in other proceedings (Pet. Br. 9). We submit, however, that cognate differences among the types of governmental inquiries are of considerable relevance in resolving Fifth Amendment claims.

A witness, it has been said, is privileged not to answer a question when that answer might furnish a "link in the chain" of evidence neecssary to prosecution. *Hoffman* v. *United States,* 341 U.S. 479, 486; *Patricia Blau* v. *United States,* 340 U.S. 159. In the *Hoffman* case, the Court made clear that in determining whether a claim of the privilege was proper, "the implications of the question," "the setting in which it is asked," and the "background" and "peculiarities" of the case are to be considered (341 U.S. at 486–487). Privilege cases, such as these, in which tests like "link in the chain" of evidence or "investigatory leads" were applied, generally involved investigations by grand juries or legislative committees—inquisitorial proceedings looking into the very matters as to which the witnesses were being questioned. Such inquiries, like that of calling a defendant to testify in a criminal case, obviously focus on the particular witness whose testimony is sought to be compelled. In such circumstances, the privilege's protection is appropriately invoked at the time of the questioning;[9] "the

[9] In other words, in the context of an inquisitorial proceeding, it is appropriate to focus upon the earlier point of incidence of the privilege (see our brief in *Costello*, pp. 19–20; see also pp. 22–25, *infra*). Such a distinction between types of proceedings, and their purpose, is reflected in congressional enactments. *Compare* 18 U.S.C. 3486, which provides complete transactional

setting in which [the question] * * * is asked" is generally a hostile one, and one in which the witness has been singled out as a possible law violator.

In contrast to a grand jury or legislative investigation—governmental inquiries focusing on the particular individual summoned and questioned—is the inquiry involved in obtaining payment of the excise tax on wagers. If one is liable for the tax, he mails Form 730, with his name, address, tax computation, and check, to the government. No cognizable infringement of the privilege results, in our view, from the government's seeking payment of a valid tax and the minimal information necessary for its collection.[10]

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immunity from prosecution to a witness who testifies in a congressional investigative proceeding, *with* 49 U.S.C. 9, which provides that any incriminating information obtained incidentally in the context of administering a particular regulatory scheme may not be used against the individual compelled to testify. See also note 15, *infra*.

[10] In this regard, it may be that the occupational tax which requires registration—the two are accomplished through the filing of a single form—should be distinguished from payment of the excise tax and the filing of the return therefor. Thus, should the Court in the *Costello* case uphold the privilege claim as to registration, it does not follow that the privilege should also be held in this case to justify a failure to pay the excise tax. As a practical matter, the possibility of incrimination is less with respect to the excise tax, which requires disclosure of a minimal amount of information, and to which neither the registration provisions (Section 4412) nor the public disclosure provision (Section 6107) relate. However, while no list is maintained of those filing excise tax returns, and the returns themselves are not available for public inspection, such returns may be made available to State and local law enforcement officials on a limited basis upon written authorization, pursuant to 26 U.S.C. 6103; see also 5 U.S.C. 22, 1002(c), and Treas. Reg. § 601.702 (a)(3) and (d).

Such a limited inquiry reflects a purpose and interest separate and independent from that in any particular individual's underlying activity.

By way of further illustration, one may ask: Is a person free to assert the privilege to justify a failure to pay a tax on his residential property, or to file a property tax return calling for his address? Suppose that a local grand jury is investigating prostitution. A person believed to own and reside in a house suspected of being a brothel is summoned and asked to give his address. In that setting, he may be privileged not to answer.[11] We assume he would not, however, be privileged to refuse to pay property taxes on the house if he were the owner, even though such payment might identify him with the suspect activities at the house as surely as would his admission of ownership to the grand jury. Similarly, it is generally required that automobiles be licensed, and information as to the car's body and engine numbers and owner's identification must be furnished. Could one whose previous theft of a car had gone undetected defend a prosecution for driving an unlicensed vehicle on the basis of the privilege?

As these examples indicate, much governmental regulation requires the disclosure of information which, under certain circumstances, might be viewed as having some incriminatory potential. Perhaps in the context of an inquisitorial proceeding, an individual might properly invoke the privilege in refusing to make some such disclosures. This is not neces-

[11] See *Simpson* v. *United States*, 355 U.S. 7, and the government's memorandum filed therein.

sarily so, however, where the setting is a significantly different one. In short, meaningful differences which exist among types of governmental inquiries should not be disregarded in evaluating the substance of privilege claims.

As developed above, the government can, in our view, properly compel payment of a valid tax without running afoul of the privilege. Should the Court disagree, however, and conclude that the limited inquiry involved in collecting the excise tax on wagers is not substantially different from governmental inquiries directed at particular individuals, it does not follow that the Fifth Amendment justifies a failure to pay the tax. The limited nature of the inquiry here, we contend, at least justifies a solution which accommodates both the tax and the privilege. See Point II, *infra*, pp. 18–29.

B. THE PRIVILEGE CLAIM IN REGARD TO PAYMENT OF THE TEN PER CENT EXCISE TAX ON WAGERS IS GOVERNED BY THE DECISIONS IN *KAHRIGER* AND *LEWIS*

Petitioner's argument to the contrary notwithstanding (Pet. Br. 10–14), the decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, encompass the claim of privilege with regard to payment of the excise tax on wagers. Petitioner points out that payment of the excise tax is to be made monthly following the acceptance of wagers, and thus relates to past acts. *Kahriger* and *Lewis* are therefore distinguishable, petitioner contends, since they involved registration and payment of the occupational tax, which relates only to future acts.

While it is doubtless true that the Court emphasized in *Kahriger* and *Lewis* the prospective nature of registration and the occupational tax, the rationale of those decisions, especially that of the *Lewis* case, is broader than petitioner recognizes. In *Lewis* the Court stated, 348 U.S. at 422–423:

> If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, * * * he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshhold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

Thus, the Court's holding (as well as the government's principal argument[12]) was that no compulsion within the purview of the Fifth Amendment was involved in the requirement that one comply with the wagering tax laws. Since the statute gave notice of the tax consequences attached to the business of accepting wagers, entry into the business, the Court

[12] See Brief for the United States, *Lewis* v. *United States*, No. 203, Oct. Term 1954, pp. 13–20.

concluded, was a matter of choice. This consideration—not merely a distinction between future and past acts—led to rejection of the Fifth Amendment claim advanced in *Lewis*.[13]

II. EVEN ASSUMING THAT PAYMENT OF THE EXCISE TAX ON WAGERING WOULD PROVIDE INCRIMINATING INFORMATION, THE PROPER REMEDY IS TO BAR THE USE OF SUCH INFORMATION IN ANY CRIMINAL PROSECUTION, RATHER THAN SANCTION A FAILURE TO PAY THE TAX

As developed in Point I, *supra*, the Fifth Amendment cannot, in our view, be relied upon to excuse the failure to pay a valid tax, even should the Court perceive problems of incrimination involved in the registration requirement at issue in the *Costello* case. But should the Court conclude that both registration under the wagering tax laws and payment of the excise tax involve substantial dangers of incrimination so as to bring into play the protections of the Fifth Amendment, this, we submit, would provide an even stronger reason for the adoption of a use-restriction rule suggested alternatively in our brief in *Costello* (pp. 17–25). Rather than repeat our argument in this regard, we incorporate by reference here the argument there developed.

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[13] So viewed, of course, the decisions in *Kahriger* and *Lewis* are applicable here. However, should *Kahriger* and *Lewis* be overruled in the companion *Costello* case, that result, in our view, would not necessarily be controlling here, for different considerations may apply in evaluating a claim that the privilege excuses not only registration but payment as well. See pp. 7–16, *supra*.

Suffice it to say, in summary, that no incrimination could result from payment of the excise tax [14] so long as the information disclosed is confined to tax purposes, and is not used in a criminal prosecution relating to the underlying activity. As we stated in our brief in *Costello,* an effective proscription on non-tax uses of the information disclosed incident to compliance with the wagering tax laws will accord full protection to an individual's right not to incriminate himself. The need for such a viable accommodation between the individual's rights and the government's interests is, in our view, significantly increased when the privilege is invoked as a justification not only for failure to register, but for failure to pay the tax at all. Striking down the registration requirement, despite its role in the overall administration of the taxing measure, would still leave Congress constitutionally free to levy and collect the tax, but would restrict somewhat the manner in which this could be accomplished. Holding that the privilege excuses failure to pay the tax at all, on the other hand, would be tantamount to deciding that Congress lacked the constitutional power to levy such a tax—and at least some similar excise taxes. Such a sweeping holding, we submit, is unnecessary and would be inappropriate here.

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[14] We assume, *arguendo*, that the filing of the appropriate return (Form 730, App. B, *infra*) must accompany payment of the excise tax, or that at least some identification of the taxpayer must be provided along with such payment, since a tax measure cannot be effectively administered without obtaining a minimal amount of information from the persons being taxed.

A. ADOPTION OF A USE-RESTRICTION RULE, AS SUGGESTED IN OUR ALTERNATIVE ARGUMENT IN THE COSTELLO CASE, WOULD APPROPRIATELY EFFECTUATE THE PRIVILEGE

As we point out in our brief in *Costello* (pp. 19–23), it would be neither unusual nor unprecedented for this Court to adopt a use-restriction rule such as that which we alternatively suggest there. Petitioner incorrectly characterizes the government's argument in this regard as one suggesting adoption of a rule of immunity. Similarly, petitioner misconstrues this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, and ignores *United States* v. *Blue,* 384 U.S. 251, upon which, along with *Murphy,* we importantly rely in the development of our alternative argument.

We do not at all suggest that this Court adopt a rule immunizing those required to register and pay the excise tax under the wagering tax laws from any prosecution which might be grounded on or make use of information disclosed incident to so doing.[15] If complete immunity is constitutionally required, then, we submit, *Murphy* and *Blue,* and a host of other cases, were wrongly decided. In *Murphy* the Court could simply have held that the witness in the State proceeding need not testify because the State immunity statute did not provide protection against incrimination under federal law, leav-

[15] Most immunity statutes grant complete immunity from prosecution in broad and general terms, and bar the subsequent prosecution of an individual for or on account of anything about which he is compelled to testify (see, *e.g.*, 18 U.S.C. 3486 (1964); see generally Note, 72 Yale L.J. 1568, 1579 (1963)).

ing it to Congress to fashion an immunity statute which would have provided the requisite protection.[16] But there is no gainsaying the fact that the Court in *Murphy* did not do this.[17] Rather, it held that the individual's right not to incriminate himself could be effectively implemented, while at the same time accommodating the governmental interests involved, by prohibiting the federal government from making use of compelled testimony and its fruits in a subsequent criminal prosecution (378 U.S. at 79). Similarly, in *Blue* the Court concluded that an exclusionary rule would adequately protect the Fifth Amendment rights asserted, and would indeed be the "most" to which the taxpayer was entitled (384 U.S. at 255).

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[16] Congress clearly can prescribe immunity from State as well as federal prosecution, in appropriate circumstances, where a federal instrumentality is seeking to compel information (see, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 436; *Adams* v. *Maryland*, 347 U.S. 179, 183).

[17] *Murphy* itself squarely refutes petitioner's assertion (Pet. Br. 26) that it has always been the legislative branch which has fashioned rules to accommodate the potential collision of Fifth Amendment rights and governmental interests. In *Murphy* the State simply lacked power to grant immunity, legislatively or otherwise, from federal prosecution, or otherwise to accord the necessary protection in that regard (see *United States* v. *Murdock*, 284 U.S. 141, 149; *Jack* v. *Kansas*, 199 U.S. 372, 380). Contrary to petitioner's assertion (Pet. Br. 27), the Court in *Murphy*, recognizing that the State immunity statute could have no effect on federal prosecutions (378 U.S. at 54), proceeded to fashion an exclusionary rule—not a rule of immunity—which would enable the State to conduct its investigation while protecting the witness from being compelled to make incriminating disclosures which might be used against him.

In other cases in which the Court has fashioned an exclusionary rule to protect the Fourth and Fifth Amendment rights involved, *e.g.*, *Weeks* v. *United States*, 232 U.S. 383, *Miranda* v. *Arizona*, 384 U.S. 436, the Court has likewise refrained from holding that a legislatively prescribed immunity from prosecution is constitutionally required. We suggest no more here than the adoption of a similar rule banning the use, direct or indirect, of information obtained incident to compliance with the wagering tax laws in any subsequent State or federal criminal prosecution. This is a step which this Court has repeatedly taken in appropriate circumstances. It would be appropriate here,[18] we submit, since it provides a fair and workable accommodation between the individual's right not to incriminate himself and the government's interest in collecting taxes.

B. THE USE-RESTRICTION RULE SUGGESTED DIFFERS FROM A RULE OF IMMUNITY

To be sure, immunity statutes are commonplace, and the decision to provide immunity has traditionally been one made by the legislative branch. What

[18] Even if *Murphy* is regarded as a decision grounded on considerations of dual sovereignty (a hardly necessary conclusion, in our view; see Mr. Justice White's concurring opinion in *Murphy*, 378 U.S. at 92–107), that does not impair its applicability here. Gamblers like petitioner are quite concerned about possible State prosecution, and claim that such may be materially assisted if they are required to register and pay under the federal wagering tax laws. Indeed, petitioner expressly notes that Pennsylvania prohibits and punishes gambling (Pet. Br. 8). Hence, dual sovereignty considerations are plainly involved here. See our brief in *Costello*, p. 19; see generally Note, 61 Nw. L. Rev. 654 (1966).

we suggest here would not in any sense conflict with the legislature's power to provide for immunity when it chooses to do so.[19] Rather, we are dealing here with a situation in which, like in *Murphy*, no effective immunity has been provided. Where there are substantial governmental interests to be served and where an exclusionary rule will both protect the individual's rights and permit the effectuation of the governmental purpose, it is surely within this Court's power to fashion such a rule.

As a general matter, immunity is legislatively conferred in those situations where obtaining a free flow of information from a particular individual is deemed to outweigh the possible governmental interest in prosecuting that individual for wrongdoing which his testimony might disclose. A different situation is presented, we submit, where the congressional purpose is the collection of an excise tax from a class of individuals and the obtaining of a minimal amount of information in relation thereto so as to permit effective enforcement of the revenue measure involved. In the latter kind of situation, as we develop more fully in our brief in *Costello* (pp. 19–23), focus upon the later point of in-

[19] Where immunity has been conferred by statute, a court is limited to determining whether the scope of the immunity provided effectively supplants the protection of the privilege (see *infra*, p. 25). Here Congress chose not to immunize those registering and paying taxes under the wagering tax laws from prosecution (see note 22, *infra*). It is therefore open to this Court, in our view, to adopt an exclusionary rule—not a rule of complete immunity—which will provide a satisfactory accommodation between the governmental and individual interests involved.

cidence—the "use point"—rather than upon the earlier one ("compulsion point"—is the appropriate way of effectuating the privilege. In our view, therefore, the use-restriction rule suggested in our alternative argument here and in the *Costello* case would, if adopted, be one of limited applicability. As we point out (*supra*, pp. 12–16), when a governmental body focuses its attention upon a certain individual by compelling him to testify, effectuation of the privilege at the earlier incidence better serves to insure full protection of that individual's rights. In such a situation, should another governmental interest be paramount to that in the particular individual's activity, a traditional accommodation is readily available, *i.e.*, enactment of an immunity statute, by which the government grants immunity from prosecution in exchange for the information possessed by the individual. Should the Court now view the wagering tax, and by analogy other similar excise taxes, as involving Fifth Amendment issues, such a drastic accommodation is not an apt or necessary one.

No one questions that it is properly for the States to decide whether gambling should be legal or not, and gamblers punished or not. But in order to levy an excise tax on gamblers, we submit, the federal government should not be forced to choose between taxation and complete immunization from all prosecution, or no taxation at all. Adoption of a use-restriction rule would obviate the need for such a difficult choice, while still according individuals the protection to which the privilege entitles them. Nor, in our view, should Con-

gress be limited to taxing gamblers solely through the income tax when legitimate businessmen have to pay both income and excise taxes.[20]

As petitioner points out, in both *Counselman* v. *Hitchcock*, 142 U.S. 547, and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, Congress had attempted to provide immunity but, the Court found, had failed to make the immunity sufficiently broad to be coextensive with the scope of the privilege. But those cases hardly support the proposition that this Court cannot, in a situation where Congress has *not* sought to provide immunity, resolve the potentially conflicting individual and governmental interests by adoption of an exclusionary rule such as here suggested. Where Congress has recognized the potential Fifth Amendment problems and determined to confer an immunity, but has failed to make that immunity sufficiently broad to stand this Court's scrutiny, it should be left free to reassess, *i.e.*, to determine whether to confer a sufficiently broad immunity or to abandon the quest for the information. On the other hand, where Congress has not anticipated that any privilege issues might arise, the appropriate result is for the Court, if it perceives such issues, to adopt a

[20] In addition, when the government summons an individual and seeks to compel him to testify, the privilege may, and indeed must, be affirmatively asserted. Such assertion of the privilege may be tested judicially, while the privilege claim in the circumstances here results, as we have stated, in the construction of "conjurer's circle"—the "taxpayer" does nothing, not even paying the tax. Instead, he simply decides unilaterally that he has a constitutional right not to comply with the law.

use-restriction rule which will protect the individual against incrimination and still uphold the substantive legislation. This is particularly so where there is a substantial governmental interest to be served—here the collection of taxes—and where the legislation in question involves the exercise of a governmental power—here the power to tax—separate and independent from the power to regulate the underlying activity to which tax relates. Here the information compelled by the government, particularly the minimal amount of information required in connection with payment of the excise tax, pertains directly to the enforcement of the tax measure; in *Albertson,* contrariwise, the information sought related to the very matters sought to be regulated by Congress, *i.e.,* subversive activities.

C. THE ALTERNATIVE REMEDY PROPOSED DOES NOT CONFLICT WITH THE CONGRESSIONAL DESIGN OF THE WAGERING TAX LAWS

Petitioner repeatedly asserts (Pet. Br. 7, 24, 27, 28) that Congress has specifically negated, by the inclusion of 26 U.S.C. 4422, the conferral of any immunity (or impliedly any restriction on the use of information obtained) incident to registration and payment under the wagering tax laws. In our view, petitioner attempts to extrapolate too much from the congressional inclusion of this section. In addition, contrary to petitioner's characterization and as explained previously (*supra,* pp. 22–25), the government here contends not for a rule of complete immunity, but simply for the adoption of an exclusionary rule similar to that fashioned by this Court in *Murphy.*

Section 4422 simply states that payment of the wagering tax "shall not exempt any person from any penalty provided" by federal or State law for engaging in the activity taxed. A consideration of the bill's legislative history shows that there was some concern that the enactment of an excise tax on wagering might be regarded as placing an implicit stamp of congressional approval on gambling as a legitimate and proper business.[21] Section 4422's inclusion prevents the drawing of any such conclusion. Neither Section 4422 nor any other provision of the statute indicates a congressional preference for a holding of invalidity as opposed to a judicially prescribed exclusionary rule. Adoption of a use-restriction rule, such as here suggested, would in no direct sense "exempt" those required to register and pay the tax from federal or State prosecution for engaging in gambling activities—they would of course be protected against the use of information so obtained—and would thus be wholly consistent with Section 4422.[22]

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[21] See, *e.g.*, S. Rep. No. 781, 82d Cong., 1st Sess. 113 (1951); H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 (1951); 97 Cong. Rec. 6891, 12238 (1951).

[22] We recognize that there was no mention in the debates or in the committee reports of a congressional recognition of any Fifth Amendment issues which the legislation might create, nor any indication of congressional consideration of whether an immunity statute should or should not have been included. But a consideration of the circumstances surrounding enactment of the legislation shows that this is of little significance. This measure was enacted in 1951. *Twining* v. *New Jersey*, 211 U.S. 78, holding the Fifth Amendment inapplicable to the States, was then the law (not to be overruled until 1964 in *Malloy* v. *Hogan*, 378 U.S. 1; see also *Knapp* v.

Petitioner's rights under the Fifth Amendment will be fully protected if the use-restriction rule which we suggest here and in *Costello* is adopted by this Court. Allowing him to draw a "conjurer's circle" around himself and determine for himself that he need not pay a tax is neither sensible as a matter of policy nor required as constitutional matter. As discussed in our brief in *Costello* (pp. 23–25), the Court, in adopting such a rationale at this time, need not attempt to resolve the various issues which might arise in any subsequent prosecutions of those required to register and pay the tax. We do in our *Costello* brief sketch the outlines of how such a rule might operate (*ibid.*). It is enough to say now that ample precedents exist to provide a framework for resolution of such issues, and the appropriate time for decision of such matters is in those later cases in which they will be concretely presented.

D. ON EITHER APPROACH TAKEN TO THE FIFTH AMENDMENT ISSUE, PETITIONER WAS PROPERLY CONVICTED FOR FAILURE TO PAY THE EXCISE TAX

Petitioner further asserts that, even should this Court adopt such a use-restriction rule, his conviction

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Schweitzer, 357 U.S. 371; *Feldman* v. *United States*, 322 U.S. 487, likewise overruled 1964 in *Murphy* v. *Waterfront Commission*, *supra*). There was then little federal legislation seeking to proscribe and punish certain interstate aspects of gambling. Whatever potential incrimination might have been involved in registering and paying the tax would, at that time, have been under State gambling statutes. See S. Rep. No. 781, *supra*, 113; H.R. Rep. No. 586, *supra*, 55. There was little reason for Congress to concern itself, therefore, with any potential Fifth Amendment problems when it enacted the wagering tax.

should be reversed. Petitioner seeks to distinguish his situation from that of petitioner in the *Costello* case on the ground that "there were no decisions of this Court holding that he had no constitutional privilege to refuse to pay" (Pet. Br. 28). Apart from the general presumption of validity attaching to congressional enactments, and the accepted view that those required to pay a tax cannot with impunity refuse to pay such tax unless and until this Court holds that tax valid, it seems patent that this contention must fail. As shown *supra*, pp. 16–18, petitioner construes this Court's decisions in *Kahriger* and *Lewis* too narrowly. And since, in any event, under those decisions petitioner had no Fifth Amendment right not to comply with the registration requirement, he could hardly have concluded that *payment* of the tax was somehow excused. Petitioner's failure to pay was unlawful and known by him to be so; indeed, petitioner testified that he knew of the enactment of the wagering tax laws and his defense at trial was that he ceased engagement in gambling activities in 1950 (R. 104–105; see *supra*, p. 3). Petitioner apparently concedes that his conviction should be affirmed if this Court holds that the Fifth Amendment does not protect him from the requirement to pay the excise tax. No different result should follow, we submit, if this Court adopts the alternative rationale suggested here and in *Costello*. Rather than elaborate, we incorporate by reference our discussion in the *Costello* brief (pp. 25–26) on this point.

III. REVERSIBLE ERROR CANNOT BE PREDICATED ON THE TRIAL JUDGE'S TREATMENT OF A NOTE FROM THE JURY

A. The case was submitted to the jury on the afternoon of Wednesday, March 4, 1964. The jury deliberated until about 11:00 p.m. that evening (R. 84), when it retired. The following day, at about 11:30 a.m., after having deliberated for a few hours in the morning, the jury sent a note to the judge in which they indicated that they could not agree (R. 84, 70). The judge instructed the bailiff to tell the jury to continue deliberating (R. 84). About forty-five minutes later, defense counsel was informed of the note and response (R. 41, 84).

The jury continued deliberating until 11:00 that evening (R. 42). As the jury was leaving to retire for the night, one juror was injured slightly on her way to the elevator (R. 42); counsel were immediately informed (R. 42). Shortly thereafter a second juror became ill (R. 42–43). A physician was called and the jurors were given medical attention (R. 43).

The jury did not deliberate the next day, Friday. At a conference that day, petitioner's counsel moved for a mistrial and for the discharge of the jury on the ground that, because of the illness of a juror, further deliberations might result "in some sort of a compromise verdict" (R. 41). The court denied the motion for a mistrial (R. 44). Thereafter there was a discussion as to whether any instructions should be reread when the jury returned for its deliberations (R. 46–48). The judge indicated that he was not in-

clined to reread any of the charge but that, if the jury were still in disagreement the following afternoon, he might ask them if there was any possibility of their reaching a verdict—to which defense counsel responded "I have no objection to that" (R. 47).

The jury resumed its consideration of the case the next day, Saturday (R. 52). At a conference that afternoon, defense counsel renewed his motion for a mistrial on the ground that one of the jurors who had received medical attention was not in a condition to participate in deliberations (R. 52–53). After some discussion, the motion was denied (R. 59). Counsel and the court then discussed whether the jury should deliberate on Sunday. During that conference, the bailiff handed the judge a note from the jury which read (R. 60):

> I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request.

The following colloquy ensued (R. 60–61):

> The COURT. * * * We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So I think we will just tell them we got their message and tell them to keep on working.
>
> Are there any further suggestions from anyone?

Mr. McLaughlin [defense counsel]. Well, we have already moved for a mistrial.

The Court. Tell them I have got their message and I suggest they keep on working.

The Bailiff. All right.

Mr. McLaughlin. Your Honor, I don't know what the technicalities of it are, but if they are going around and if they are going to be kept together, they may as well deliberate on Sunday as not.

A few hours later, on Saturday evening, the jury returned its verdict (R. 61–65).

In a motion for a new trial, filed three days later, the defense contended, *inter alia,* that the court erred in accepting, and replying to, a communication from the jury in the absence of the defendant and his counsel, and in not making the first note a part of the record (R. 83). At the hearing on the motion the court commented that that note had stated only that the jury could not agree, and that it was a "mere oversight" that the note had not been shown to counsel. The court also adverted to the second note and stated that the two notes were in substance the same (R. 70). Counsel then suggested that perhaps the clerk had the two notes; the judge responded that he did not know whether the clerk had the notes but that both notes stated only that the jury could not agree (*ibid*). Counsel then proceeded to reargue his motion for a mistrial on the ground of the illness of a juror (R. 70–71). Apparently the first note had in fact been discarded.

B. The first mention of the issue of an improper communication to the jury came not when defense counsel was notified of the first note and response some forty-five minutes after the incident, nor the following day when counsel and the court conferred regarding the illness of a juror, nor when a similar second note was received. The point was made only after verdict, and then in a *pro forma* manner. At the time he learned of the first note and response, defense counsel did not seek to ascertain the contents of the note, or notify the judge of his objection so that the judge might preserve the note. And when the second note was received, counsel did not object to the judge's method of handling the situation—by having the bailiff relate to the jury that the judge felt they should keep on working. Thus, having waited silently until after the verdict, petitioner is in no position now to have the five-week trial declared for naught on this ground. See *United States* v. *Gersh,* 328 F. 2d 460, 463–464 (C.A. 2), certiorari denied *sub nom. Mugnola* v. *United States,* 377 U.S. 992; *United States* v. *Woodner,* 317 F. 2d 649, 651–652 (C.A. 2), certiorari denied, 375 U.S. 903; *United States* v. *McGrady,* 191 F. 2d 829, 831 (C.A. 7), certiorari denied, 342 U.S. 911; *United States* v. *Coduto,* 284 F. 2d 464, 468 (C.A. 7), certiorari denied, 365 U.S. 881; *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C.A. 7), certiorari denied, 327 U.S. 794.

Moreover, even assuming that the judge's informal procedure in answering the first note was erroneous, it does not warrant reversal of the conviction. See *Walker* v. *United States,* 322 F. 2d 434 (C.A.D.C.), certiorari denied, 375 U.S. 976; *Johnson* v. *United*

States, 270 F. 2d 721, 725 (C.A. 9), certiorari denied, 362 U.S. 937; *United States* v. *Compagna,* 146 F. 2d 524, 528 (C.A. 2), certiorari denied, 324 U.S. 867; *Outlaw* v. *United States,* 81 F. 2d 805, 808 (C.A. 5), certiorari denied, 298 U.S. 665; *United States ex rel. Shapiro* v. *Jackson,* 263 F. 2d 282, 283 (C.A. 2); *Bacino* v. *United States,* 316 F. 2d 11, 14 (C.A. 10), certiorari denied, 375 U.S. 831. Manifestly, the communication in this case—"keep on working"—is totally different from those condemned in *Remmer* v. *United States,* 347 U.S. 227, and in *Shields* v. *United States,* 273 U.S. 583, in which the judge gave a legally erroneous and arguably coercive response to a jury's note.

Petitioner contends that the rule is, or should be, that reversal is required where there is a communication to the jury without the defendant's being present, unless the absence of prejudice is affirmatively shown on the record (Pet. Br. 34). He then relies upon (1) the absence of the first note in the record, and (2) "horribles" (Pet. Br. 39) he constructs which might arise from the use of the bailiff as a messenger. However, as we have shown, petitioner made no attempt to see that the note was preserved, and did not object to the use of the bailiff in responding to the second note. Accordingly, whatever merit petitioner's statement of the rule might have in cases where the defense has seasonably objected and when the objectionable incident is more highly suspect, it should have no application in the circumstances here.[23]

[23] Unlike *Parker* v. *Gladden,* No. 81, this Term, decided December 12, 1966, there is no factual basis here upon which to find any likelihood of prejudice resulting from the bailiff's com-

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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DECEMBER 1966.

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munication to the jury. In virtually every jury case, a bailiff has unsupervised contact with the jury during the period of their deliberation. Idle speculation as to possible misconduct and possible prejudice arising during that contact certainly is an insufficient basis upon which to set aside a conviction, where substantiation in the record is wholly lacking, and where the defense did not attempt to establish the claim as a ground for relief by, for example, calling the bailiff as a witness at the hearing on the post-trial motion.

APPENDIX A

INTERNAL REVENUE CODE OF 1954

Section 4401 provides:

Wagers.

(*a*) There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

Amount of wager.

(*b*) In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

Persons liable for tax.

(*c*) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Section 4402 provides:

Exemptions.

No tax shall be imposed by this subchapter—

(1) *Parimutuels.*

On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) *Coin-operated devices.*

On any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2) if an occupational tax is imposed with respect to such device by section 4461, or

(3) *State-conducted sweepstakes.*

On any wager placed in a sweepstakes, wagering pool, or lottery—

(A) which is conducted by an agency of a State acting under authority of State law, and

(B) the ultimate winners in which are determined by the results of a horse race,

but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Section 4421 provides:

Definitions.

For purposes of this chapter—

(1) *Wager.*

The term "wager" means—

(A) any wager with respect to a sports event or contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) *Lottery.*

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

Section 4422 provides:

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

Section 6107 provides:

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officers of any State, county,

or municipality there shall be furnished to him a certified copy thereof, as a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

Section 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

TREASURY REGULATION

Section 44.6011(a)–1(a) provides:

> Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

APPENDIX B

FORM 730 (Rev. Sept. 1960)
U. S. Treasury Department
Internal Revenue Service

I declare under the penalties of per
any accompanying certificates and st
by me and to the best of my knowlec
and complete return.

(Signed) .....

(Title) .....
(Owner, president, pa

(THIS SPACE FOR NAME, ADDRES

ORIGINAL RETURN.—This form must be filed,

and shall retain a copy of the certificate furnished t
lay-off wager.

4. CREDITS.—(*a*) *General credits.*—Any perso
due with one monthly return may take credit for t
the tax due with any subsequent monthly return.
statement fully explaining the reason such credit
tached to the return. This statement should also sho
claim for credit or refund covering the amount
thereof, has been filed; and should list each amount
the credit, monthly return on which reported, date
tax was paid with respect to more than 1 month, t
credit chargeable to each month. A complete and
credits must be kept by the taxpayer for a period of
date the credit was taken. No credit shall be allow
provided in the succeeding paragraph), whether i
decision or otherwise, unless the taxpayer establish
collected the tax either as a separate charge or as
respect to which it was imposed, or (2) that he ha
the tax to the person making the wager or has secu
of such person to the allowance of the credit. If th
payment of tax with respect to a laid-off wager,
establish that the tax was not collected by any perso
the tax has been refunded to the person who place
or that he has secured the written consent of such p
of the claim.

(*b*) *Lay-off credits.*—Under section 6419 (b) a
a taxpayer for tax paid by him or tax due with re
such wager was laid off with another taxpayer who
respect to such laid-off wager. If such a credit is ta

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